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In The

Supreme Court of the United States

October Term, 1998

KORDICE M. DOUGLAS,

Petitioner,

versus

DYNMcDERMOTT PETROLEUM OPERATIONS COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE

A. Introduction.

The petition misstates some of the facts below and misconstrues both the Fifth Circuit's holding and those of other circuit courts that purportedly "conflict" with the opinion below.

Contrary to the petition's assertion, the Fifth Circuit clearly held that in-house counsel do not forfeit any rights to engage in activities protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* and §1981. All the court held, in a narrow opinion, was that lawyers could not unilaterally disclose client confidences without making any attempt to preserve those confidences and then claim under Title VII that the disclosures were "protected activities."

Every Louisiana lawyer, upon admission to the Bar, takes an oath to "maintain the confidence and preserve inviolate the secrets of my client." This case involves a company's termination of its senior counsel who, both during the course of her employment and afterwards, deliberately revealed client confidences.

It is important to note what this case does not involve. The confidences revealed by the petitioner, Kordice Douglas, were not done to protect public safety; they were not done to protect against imminent bodily harm to any person or to the environment; and they were not done pursuant to a court order. Douglas made no attempt whatsoever to protect attorney-client confidential information.

None of the considerations of Rule 10(a) of this Court are met in the petition.

B. The petition misstates portions of the record below.

Because the petition mischaracterizes portions of the record below, it is necessary to set forth the facts in more detail than ordinarily would be required in an opposition. Douglas, an African-American female, held a position of great trust and was one of only three attorneys at DynMcDermott. DynMcDermott is a private corporation with more than 900 employees (Tr. V 22, pp. 573, 580) that manages and operates the country's Strategic Petroleum Reserve facilities, the nation's bulwark supply to preserve energy independence in times of national crisis. 42 U.S.C. §6201 *et seq*. Contrary to the petition's assertions (at p. 4), there can be no factual dispute that the Fifth Circuit was correct when it stated that the relationship between DynMcDermott and the Department of Energy "was purely contractual and at arm's length." *Douglas v. DynMcDermott Petroleum Operations Company*, 144 F.3d 364, 366 (5th Cir. 1998). This was a government contract concerning a vital defense project; the fact that DynMcDermott's only client was the D.O.E. does not alter the legal analysis. Douglas' sole employer was DynMcDermott. Douglas had no attorney-client relationship with the D.O.E.

Contrary to the implication in the petition (at p. 5) that Douglas was involuntarily ensnared in the June 6, 1994 meeting involving a review of the company's employment procedures between D.O.E. officials and John Poindexter, the General Counsel of DynMcDermott,

the record demonstrates that Poindexter called Douglas into the meeting and offered to have the D.O.E. employees meet privately with her (Tr. V.23, pp. 707-09); however, both Douglas and the D.O.E. employees assured Poindexter that he need not leave. Tr. V 21, p. 224; Tr. V 23, pp. 709.

Contrary to the petition's implication (at p. 5) that Poindexter's silence during the meeting represented acquiescence to Douglas' disclosures, the record is undisputed that Poindexter, although "horrified" by her statements, said nothing during the meeting for fear of overemphasizing these items and causing further damage to the company's confidential and privileged information. Tr. V 23, pp. 711-3.

The petitioner's statement of facts fails to mention that Douglas failed to follow the company's internal procedures for raising claims of sex and race discrimination, although she was the primary legal contact for the Human Resources department and was fully aware of the company's procedures.

Contrary to the implications in the petition (p. 8), the record clearly supports the Fifth Circuit's finding that "Douglas confirmed that the D.O.E. was *not* to treat the Response as a whistleblower complaint." 144 F.3d at 367, 373 (emphasis supplied); Tr. V 21, p. 409.

The petition fails to note that at no time did Douglas attempt to invoke court or administrative protections for the confidences she was revealing.

The petition omits mention of the detailed internal examination that occurred prior to Douglas' termination.

When it became apparent that she had disclosed confidential information in the five-page rebuttal she had sent to Mr. O'Neill of the D.O.E., DynMcDermott convened a termination board consisting of some of the company's highest officials: its President; its Director of Human Resources; its Deputy Project Manager; and its General Counsel. Tr. V 22, pp. 577-578. After several meetings, the Director of Human Resources recommended that she be terminated because, as the company's attorney, she had failed to maintain confidential information. Tr. V 22, pp. 578-79, V. 23 pp. 627-32, 662, 759-61. This recommendation was unanimously supported by the termination board because of her "continued violation of her responsibilities as an attorney." Tr. V. 23, pp. 759-763.

The petition further omits other actions Ms. Douglas took, after her termination, that continued to violate her obligations to protect confidences. As the Fifth Circuit noted (144 F.3d at 367), after her termination she not only forwarded her five-page letter to Congressman William Jefferson (D., La.) and to the head of the NAACP, she also sent a copy to Hazel O'Leary, Secretary of the Department of Energy, along with a package of the company's "private documents gathered from the company's legal files before she was discharged." *Id.*

It was only after all of these actions occurred that Douglas filed a complaint with the Equal Employment Opportunity Commission. As the Fifth Circuit noted, the "sole basis" of the complaint was that she "opposed practices made unlawful under Title VII." *Id.*

Contrary to the petition's assertions that the information disclosed by Douglas both before and after her termination were "routine business" matters (p. 7), the record is clear that what were revealed were client confidences (144 F.3d at 371); further, that issue is not before this Court. The petition does not brief this issue nor is it listed among the questions presented. Rather, the petition concedes that confidences were revealed and then attempts to argue that these revelations were protected under the Louisiana Rules of Professional Conduct.

II.

REASONS FOR DENYING THE WRIT

A. The petition misreads both the Fifth Circuit's opinion and the opinions of other circuit courts.

1. The Fifth Circuit's opinion does allow in-house counsel to engage in protected activities that are not accomplished through the unilateral and unprotected disclosure of client confidences.

The petition incorrectly contends that there is a split among circuits on the issue of protected activities. Douglas is simply wrong in reading the Fifth Circuit's ruling as requiring an in-house counsel (or, for that matter, any attorney) to forfeit rights under federal labor laws. The holding, rather, is that an attorney cannot be engaged in a "protected activity" if the sole basis of that assertion is the disclosure of client confidences. The Fifth Circuit was careful to point out it did "not gainsay in the least" the right of an attorney "under Title VII to oppose allegedly discriminatory practices by her employer," and it held

that an attorney does not "surrender her Title VII rights" when she becomes in-house counsel. 144 F.3d at 376.

The court also noted that conduct which "does not constitute a breach of the legal profession's ethically imposed obligations, but that nevertheless adversely impacts the employment relationship between an in-house counsel and her employer-client, remains subject to the balancing test . . . before it must be determined to be unprotected conduct under Title VII." 144 F.3d at 376, fn. 15.

The court went out of its way to point out that if an attorney is required to disclose confidences, "there are appropriate means . . . that limit the dissemination of the information disclosed," including *in camera* review by an appropriate tribunal, sealing the record, or the use of fictitious names. 144 F.3d at 375, fn. 12. *In camera* review is a procedure suggested by this Court when one seeks to assert that otherwise privileged documents should be disclosed under the crime-fraud exception. *U.S. v. Zolin*, 491 U.S. 554 (1989). The use of fictitious names is appropriate when a lawyer is attempting to use matters that are privileged or confidential in pursuing the lawyer's own claims. *Doe v. A Corporation*, 709 F.2d 1043 (5th Cir. 1983).

The Fifth Circuit's opinion below is circumscribed; an attorney cannot "oppose the allegedly unlawful practices of her employer-client and . . . do so in a manner that violates the ethical duties of the profession." 144 F.3d at 376. This is entirely consistent with opinions of the Fifth Circuit and other courts that allow in-house attorneys to maintain private actions against their employers as long as they do not result in the unilateral and unprotected

revelations of confidential or privileged communications. *See, e.g., Doe, supra; Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986), *cert. den.*, 479 U.S. 1066 (1987).

2. The opinion of the Third Circuit is not in conflict with the holding below.

The petition wrongly asserts that the opinion below conflicts with *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3rd Cir. 1997). The issue in *Kachmar* arose pursuant to a "motion to dismiss and/or partial summary judgment" (109 F.3d at 177); there was no allegation that the protected activity of the in-house counsel consisted of disclosure of client confidences to third parties. Indeed, the protected activities consisted of internal communications to the client's own employees and officers. *Kachmar* merely held that in-house counsel do not forfeit Title VII's protection merely because they are attorneys. *Id.* at 186. This holding is congruent with the Fifth Circuit's ruling here. An attorney does not forfeit rights under Title VII simply because she is a licensed lawyer; however, she may not seek Title VII protections for activities that consist of "unethical conduct" (144 F.3d at 376) violating the rules of the legal profession.

3. The Fifth Circuit's opinion on the balancing test is not in conflict with the holdings of other circuits.

The petitioner misreads five cases in an attempt to create a conflict among the circuits where none exists. Not a single one of the cases cited by the petitioner

reaches any holding that is inconsistent with the Fifth Circuit's opinion.

The petitioner implies that the rulings of *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976); *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3rd Cir. 1978); *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253 (4th Cir. 1998); *Jennings v. Tinley Park Community Consolidated School District No. 146*, 796 F.2d 962 (7th Cir. 1986), and *O'Day v. McDonnell Douglas Helicopter Company*, 79 F.3d 756 (9th Cir. 1996), require that courts may not determine, as a matter of law, that a plaintiff has not met the requirements of the balancing test before finding that the employee (including an attorney subject to ethical constraints) is not engaged in a protected activity under Title VII. That implication is without merit.

The crucial distinction between these five cases and the petitioner's claim is that none of the cases involved an attorney who had a legal and ethical obligation to protect client confidences.[1] Thus, none stand for the proposition that Douglas asserts – that Title VII trumps the ethical and legal rules that bind all attorneys and that

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[1] All the plaintiffs in these cases had a complaint of retaliatory discharge. *Hochstadt* was a microbiologist complaining about a pay differential based on her sex; *Hicks* was a white male supervisor of housing evaluation operations complaining of race discrimination; *Laughlin* was a secretary to an airport manager; *Jennings* was a secretary of a school district superintendent complaining about a pay differential based upon her sex; and *O'Day* was an engineer for a helicopter company complaining of age discrimination.

mandate their protection of client confidences, secrets, and privileges.

It is notable that three of the cases, *O'Day*, *Laughlin* and *Hochstadt*, were summary proceedings in which the courts held, as a matter of law, that the allegations about being engaged in a protected activity could not legally outweigh the employer's legitimate interests. The courts in each of these three cases found, as a matter of law, that the plaintiff's activities were beyond the scope of Title VII's protections.[2] The Fifth Circuit's ruling does not create, as the petition contends (p. 16), a "third prong" to the balancing test; rather it merely recognizes that courts may rule as a matter of law that the employee's interests cannot outweigh certain other considerations. The Fifth Circuit's opinion comports with the approaches in *O'Day*, *Laughlin*, and *Hochstadt*. As flagrant as the plaintiffs' actions were in those cases,[3] they pale in comparison to Douglas' activities that violated both the legal and ethical duty she held as a professional attorney obligated to maintain her client's confidences.

The Fifth Circuit's ruling is not in conflict with these decisions. The Fifth Circuit expressly recognized and utilized the balancing test (144 F.3d at 373-376); it weighed

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[2] *O'Day*, 79 F.2d at 763-64; *Laughlin*, 149 F.3d at 260; *Hochstadt*, 545 F.2d at 230-34.

[3] *O'Day* stole sensitive company documents; *Laughlin* surreptitiously took documents out of her boss' desk, copied them, and sent them to another employee to use; and *Hochstadt* engaged in "bitter personal exchanges" (545 F.2d at 230) with her superiors, and took actions that "went beyond the scope of protected opposition," (*id.* at 233).

Douglas' rights under Title VII with her ethical duties as an attorney; and it determined "as a matter of law that conduct that breaches the ethical duties of the legal profession is unprotected under Title VII." *Id.* at 376.

B. There is no need for this Court to address the balancing test.

Petitioner asserts that this Court both should address whether the balancing test is the appropriate standard under Title VII and should decide whether the test ought to be applied to in-house counsel. These suggestions are without merit.

The Fifth Circuit did apply the balancing test here. There is no split in the circuits on whether or how the balancing test should be applied. There is no basis for this Court to review the decision below.

C. The petitioner was not within the scope of Rule 1.6(b)(2) when she unilaterally revealed client confidences.

The petitioner misreads Louisiana Rule of Professional Conduct 1.6(b)(2) when she suggests that this Rule condones and permits unilateral action by an attorney that reveals client confidences, without any attempt to maintain or protect those confidences.

Writings about attorney obligations are often couched in terms of "confidentiality" when the issue involves ethical questions and "privilege" when the issue

relates to evidentiary matters.[4] The duty to maintain confidences, however, is broader than the scope of legal privileges[5] and prevents an attorney from voluntarily revealing all information gained in the course of representing a client except: to advance the client's interests; or with the client's permission; or for certain other limited purposes.[6]

This Court has noted that client confidences are subject to extraordinarily high protection.[7] *Swidler & Berlin v.*

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[4] *See, e.g.*, Charles Wolfram, MODERN LEGAL ETHICS 242, 250-51, 297-99 (1986); Rust E. Reid, *et al.*, *Privilege and Confidentiality Issues When a Lawyer Represents A Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541 (1996).

[5] *See Doe v. A Corp.*, 709 F.2d 1043, 1046 (5th Cir. 1983); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979); *see also United States v. Ballard*, 779 F.2d 287, 293 (5th Cir. 1986), *cert. den.*, 475 U.S. 1109 (1986) ("[t]he evidentiary attorney client privilege exists apart from, and is not coextensive with, the ethical confidentiality precept."); *X Corp. v. Doe*, 805 F. Supp. 1298, 1307 (E.D. Va. 1992), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994).

[6] *See* the ABA comments to Rule 1.6.

[7] *See also* Note, 80 YALE L.J. 317, 343 (1970), quoted with approval by Justice Stewart in his dissent in *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972), a case involving whether reporters could be compelled to testify before a grand jury, " 'The newsman-informer relationship is different from . . . other relationships whose confidentiality is protected by statute, such as the attorney-client and physician-patient relationship. In the case of other statutory privileges, the right of nondisclosure is granted to the person making the communication in order that he will be encouraged by strong assurances of confidentiality to seek such relationships which contribute to his personal well-being. The judgment is made that the interests of society will be served when individuals consult physicians and lawyers; the

United States, ___ U.S. ___, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) held that the right to preserve confidential communications survives even the client's death. Other courts, in the context of litigation between a terminated in-house attorney and the client, have been careful to stress the need for stringent protections of client confidences during the course of a suit. *See, e.g., Siedel v. Putnam Investments, Inc.*, 147 F.3d 7, 11 (1st Cir. 1998); *General Dynamics Corporation v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994);[8] *GTE Products Corp. v. Stewart*, 653 N.E.2d 161, 167 (Mass. 1995). No court has ever suggested that a lawyer may disclose confidences outside of such a setting. As *Siedel* noted: " . . . our research has failed to unearth a single reported case from any jurisdiction in which an attorney has been permitted to use confidential information offensively when the attorney chafed at the client's criticism of his work (even if the attorney viewed that criticism as defamatory)." 147 F.3d at 11.

The danger of untrammeled disclosure of confidences is great, particularly, where (as here) the disclosure was made to a government agency. Even "voluntary" disclosure to government agencies in one context can waive a claim to privilege in future civil litigation: see the discussion of this issue in *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1423-24 (3rd

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public interest is thus advanced by creating a zone of privacy that the individual can control."

[8] Petitioner (at p. 22) misreads *General Dynamics* and fails to note its admonition that confidences are to be assiduously protected.

Cir. 1991). As Justice Douglas noted in *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972), in speaking of privileges and the Sixth Amendment, but in a statement applicable here, the right to have counsel "obviously involves the right to keep the confidences of the client from the ear of the Government . . . "

There is no basis for the petitioner to assert that simply because she wants to make a "claim" under Title VII, this in and of itself frees her from any obligation to maintain confidences. If this were the case, Rule 1.6's prohibitions against revealing confidences would be rendered meaningless, for any attorney could disclose any confidence merely by couching it in terms of "a claim" in a controversy between lawyer and client. Rule 1.6 cannot be read so cavalierly as to permit lawyers to unilaterally waive confidences merely because they have a dispute with a client. As the Fifth Circuit held, an attorney has a right to assert Title VII's protections; however, she also has the ethical obligation to take appropriate actions to preserve her client's confidences in doing so. When she fails in this obligation, she cannot claim that her actions are within the scope of Rule 1.6.

CONCLUSION

Lawyers do not lose legal protections when they gain their law license; however, once they become part of the profession, they take on important legal and ethical responsibilities: paramount among these are their obligations to protect their clients' confidences, secrets, and privileges. When a lawyer is engaged in a dispute with a

client or former client, the lawyer should be free to pursue her claims in an appropriate forum. What she is not permitted to do, however, is to use the fact of the dispute to disclose confidences while making no effort whatsoever to protect those confidences from disclosure. There are numerous ways that lawyers can act ethically in such circumstances, including: seeking to file under seal the confidences allegedly needed to pursue the claim; disguising the names of all the parties; or invoking a proceeding and then seeking an *in camera* review of the documents to obtain a determination whether they are in fact confidential or privileged.

When a lawyer makes none of these efforts, Title VII is no haven. The decision below was correct legally. There is no split in the circuits. This case does not merit further review by this Court.

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